# Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

ALMA F. BIRCKNER, PETITIONER,
VS.
ROBERT TILCH ET AL.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals for the State of Maryland, in the case of Alma F. Birckner *et al.* versus Robert Tilch *et al.*, appears in the record, pages 86-95, but has not yet been reported, and is incorporated here by reference. There was no opinion by the trial court.

### II.

### JURISDICTION.

The judgment of the court of appeals below was entered February 19, 1941 (R. pp. 86-95). Petitioner's motion for reargument, being considered, was overruled

April 9, 1941 (R. pp. 97-99). Said court of appeals is the highest court in the said state which could have adjudicated the matter. The jurisdiction of this court is invoked under Judicial Code, Sec. 237, as amended by Act of February 13, 1925, 43 Stat. 937, Tit. 28, Sec. 344(b), United States Code Annotated.

## III.

## STATUTE INVOLVED.

The pertinent provisions of Section 159, of Article 16 of the Annotated Code of Maryland (Flack, 1939), are as follows:

> "The court may decree a partition of any lands, tenements, or hereditaments, or any right, interest or estate therein, either legal or equitable, on the bill or petition of any joint tenant, tenant in common, or any parcener or any concurrent owner, whether claiming by descent or purchase, or if it appear that such lands, tenements, or hereditaments, or right, interest or estate therein cannot be divided without loss or injury to the parties interested, the court may decree a sale thereof, and a division of the money arising from such sale among the parties, according to their respective rights * * *."

## IV.

## STATEMENT OF THE CASE.

An adequate statement of the case has been given in the petition under the heading, "Summary Statement of Matters Involved," and it is incorporated herein by reference.

## V.

## SPECIFICATION OF ERRORS.

1. The court of appeals below erred in predicating its finding of a valid exercise of jurisdiction in the cause, upon the hypothesis testator's will operated as a devise of

the lands made the subject matter of testator's contract of sale.

2. The court of appeals below erred in concluding the testator's contract of sale of the subject matter of the cause did not operate, in equity, to convert the subject matter of the cause into personalty passing under the express and specific bequests created in the will.

3. The court of appeals below erred in concluding the testator's executor-trustee-legatee-complainant had authority, *sua sponte*, and without testamentary, contractual, or judicial authority, to rescind, abrogate, or annul the said contract of sale of the subject matter of the cause.

## VI.

## SUMMARY OF ARGUMENT.

1. A devise of the subject matter of the cause was an indispensable prerequisite to exercise of jurisdiction. The contract revoked the devise thereof.

2. Testator's sale of the subject matter of the cause, operated in equity, to convert said lands into personalty.

3. Testator's executor is, in equity, a trustee charged with the utmost good faith in dealing with the trust property, which trust he deliberately breached.

4. Testator's right in said lands was a chose in action—personalty—title to which was held by the trustee for the benefit only, of testator's legatees.

5. Testator's said contract of sale was an imperative trust, and the executor had no power or authority to rescind same.

6. Jurisdiction, in the sense of the fundamental absence of any and all right to take cognizance of the cause was lacking; wherefore the proceedings constituted a denial of due process of law.

7. Due process of law is process according to the law of the land.

8. The question of due process was originally raised in proper and unmistakable terms.

9. Specific reference to the constitutional question, as appearing in petitioner's motion for reargument was timely, and in itself sufficient to raise the constitutional question.

## VII.

## ARGUMENT.

### POINT 1.

### A Devise of the Subject Matter of the Cause Was an Indispensable Prerequisite to Exercise of Jurisdiction. The Contract Revoked the Devise Thereof.

In terms the Maryland statute under which complainant brought his action deals solely with lands or interests or estates therein. The bill alleged title in fee simple, in testator, as of the time of his death.

The will bears date of February 1, 1933. The subject matter of the cause is expressly withdrawn from consideration as a specific devise. The residuary clause only could possibly operate to devise the subject matter.

On November 1, 1936, testator executed written contract, under seal, for a valuable consideration, for sale of the subject matter.

This court has previously held such a transaction revokes the devise in the will.

> "A valid agreement or covenant to convey, which equity will specifically enforce, will operate in equity as a revocation of a previous devise of the land." *Bosley et al.* v. *Bosley's Executrix,* 14 How. 390, 396, 14 L. Ed. 468.

> "* * * Property owned by the testator, but conveyed during his lifetime, does not pass by his will." Thompson, Wills (2d Ed.), Sec. 40, p. 65.

"A contract of sale, if all the terms are agreed upon, * * * operates as a conversion of the property. * * * In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser."

Pomeroy, Equity Jurisprudence (4th Ed.), Vol. 3, Sec. 1161, p. 2753.

On the record, every element required to work a conversion is present in the instant contract.

The court of appeals below did not find any such element lacking.

It did enter judgment contrary to the principles expressed in the *Bosley Case, supra.*

POINT 2.

**Testator's Sale of the Subject Matter of the Cause, Operated in Equity, to Convert the Said Lands into Personalty.**

A contract for the sale of lands effects an equitable conversion of the land into personalty. Where such contract provides for payment of purchase price upon a date subsequent to the death of the vendor, his right to the unpaid portion of the purchase money is a chose in action, and in equity passes to his personal representative.

*Griffith* v. *Stewart,* 217 U. S. 323, 54 L. Ed. 782, 30 S. Ct. 528.

"* * * 'nothing is better established than this principle, that * * * land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given. * * *.' "

*Craig* v. *Leslie,* 3 Wheat. 563, 577, 4 L. Ed. 460.

The court of appeals below entered judgment contrary to the principles expressed and adjudicated in these cases.

## POINT 3.

### Testator's Executor Is, in Equity, a Trustee Charged with the Utmost Good Faith in Dealing with the Trust Property, Which Trust He Deliberately Breached.

"Many forms of conduct permissible in a workday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. * * *."

Cardozo, J., *In re: Taft's Will*, 260 N. Y. S. 294, 299, 300.

"* * * an executor is chargeable with the utmost good faith in dealing with the estate entrusted to him. He cannot wantonly neglect the property, * * *."

*Glasgow* v. *Lipse*, 117 U. S. 327, 333, 29 L. Ed. 901, 6 S. Ct. 757.

"In the court of chancery, executors and administrators are considered as trustees, and the court exercises original jurisdiction over them in favor of * * * legatees, * * * in reference to the proper execution of their trusts."

*Green's Admr.* v. *Creighton*, 23 How. 90, 106, 16 L. Ed. 419.

The excutor, in the case presented here,

Firstly, attempted to extend testator's contract, entirely without authority, and thirteen (13) days prior to the date set forth therein as date for performance;

Secondly, delayed, for a period above two (2) years from the date designated by said contract as the date for settlement thereunder, before bringing any action with

respect thereto; and then instituted the current litigation in the capacity of "heir," only;

Thirdly, refused to file an appearance, for any purpose, as executor and trustee;

Fourthly, admittedly never made the slightest effort to bring about, or require, performance of his testator's contract;

Fifthly, admittedly pursued a scheme designed to convey the said lands to his testator's vendee, in contravention of his testator's contract of sale thereof, at a loss to the estate of three thousand ($3,000) dollars plus interest;

Sixthly, deliberately refused to comply with petitioner's written demand that he make effort to enforce the terms of said contract as against the said vendee.

In so doing he established and proved an utter and deliberate want of "the utmost good faith"; and the existence of an executed design to "wantonly neglect the property," for the sole and only purpose of reducing the respective shares vested in the residuary legatees, including petitioner.

POINT 4.

**Testator's Right in Said Lands Was a Chose in Action—Personalty—Title to Which Was Held by the Trustee for the Benefit Only, of Testator's Legatees.**

All debts had been satisfied and all other instructions of testator met, save distribution of the subject matter. The subject matter was expressly and specifically bequeathed to petitioner and others, in the residuary clause which carried the entire residue.

What was the executor's situation with respect thereto?

> "* * * Upon acceptance of the trust there vests in the * * * executors, as of the date of the death,

title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper distribution of the estate and for distribution of the residue. * * *."

*Brewster* v. *Gage*, 280 U. S. 327, 334, 74 L. Ed. 457, 59 S. Ct. 115.

"The executor though holding the title to the personal assets is not absolute owner of them * * * He holds them in trust to pay the debts of the deceased, and then to discharge his legacies."

*Smith* v. *Ayer*, 101 U. S. 320, 327, 25 L. Ed. 955.

POINT 5.

**Testator's Said Contract of Sale Was an Imperative Trust, and the Executor Had No Power or Authority to Rescind Same.**

" * * * there is a clear and well-defined distinction between a mere power, when the act is left to the will of the party to whom it is given, and powers in the nature of trusts. In cases of the latter class, the rights and interests of third parties, who are beneficially interested in the trusts which arise and grow out of the execution of the power, come in, and can be enforced against the party to whom the power is given. Mere powers are never imperative; trusts are always imperative and obligatory upon the conscience of the party entrusted."

Bogert, Trusts and Trustees, Vol. 3, Sec. 552, p. 1740.

"* * * an imperative direction to sell and dispose of the proceeds in a certain way, * * * is a power coupled with a trust."

*Taylor* v. *Benham*, 5 How. 233, 267, 12 L. Ed. 130.

"The trustee cannot cancel or undo a trust once accepted, by merely withdrawing from it or announcing his purpose so to do."

Black, Rescission and Cancellation (2d Ed.), Vol. 3, Sec. 553, p. 1363.

"An executor * * * has ordinarily no authority as such to waive or rescind a contract or covenant for the sale of land made by his decedent."
Rescission, 24 C. J., Sec. 629.

"* * * the executor, * * * represents the rights and the obligations which had been those of the deceased. * * *."
*Hess* v. *Reynolds*, 113 U. S. 73, 76, 28 L. Ed. 927, 5 S. Ct. 377.

Here the executor represented the right of the testator to the purchase price only. Expressly directed to sell to the vendee named in the contract, in a valid and binding agreement executed under seal; and commanded in the will to distribute the purchase price to petitioner and others; he illegally undertook to abrogate and annul the contract of his testator.

He was powerless to rescind the contract of the dead man to the same extent and in the same degree as he would have been powerless to have made a contract in his behalf without his authority.

POINT 6.

**Jurisdiction, in the Sense of Fudamental Absence of Any and All Right to Take Cognizance of the Cause Was Lacking; Wherefore the Proceedings Constituted a Denial of Due Process of Law.**

The bill was filed under Section 159 of Article 16 of the Code of Maryland. That statute is, in terms, applicable to realty only. Jurisdiction to determine a cause filed thereunder is entirely statutory, and absolutely limited to consideration of the statutory subject matter.

"* * * due process of the law must be found in the state statute, and cannot be departed from without violating the Constitution of the United States."
*Del Castillo* v. *McConnico*, 168 U. S. 674, 683, 42 L. Ed. 622, 18 S. Ct. 229.

Attempting to adjudicate litigation, the record whereof plainly indicates lack of statutory jurisdiction, amounts to a violation of the constitutional guarantee of due process of law.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, * * *. * * * And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist."
>
> *Scott* v. *McNeal*, 154 U. S. 34, 46, 38 L. Ed. 896, 14 S. Ct. 1108.

See, also, *Valley* v. *Northern Fire and Marine Ins. Co.*, 254 U. S. 348, 353, 65 L. Ed. 297, 41 S. Ct. 116; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 236; *McDonald* v. *Oregon R. and Nav. Co.*, 233 U. S. 665, 58 L. Ed. 1145, 34 S. Ct. 772; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Thompson* v. *Whitman*, 18 Wall. 457, 21 L. Ed. 897.

## POINT 7.

### Due Process of Law Is Process According to the Law of the Land.

In the case presented here, the principles of the common law, the terms of the statute involved, and the long series of decisions of this court, each and all unequivocally declare jurisdiction to be lacking, in that the said statute did not authorize exercise of the court's jurisdiction over the personalty made the subject matter of the cause.

Nonetheless the court of appeals below entered its judgment to the contrary, predicating that judgment upon untenable principles of law in conflict with the law of the land.

> "In determining whether or not due process of law has been denied, regard must always be had to the character of the proceedings involved for the purpose of determining what the practice at common

law was and what the practice in this country has been in like cases."

*Crane* v. *Hahlo*, 258 U. S. 142, 147, 66 L. Ed. 514, 42 S. Ct. 214.

"* * * due process of law is process according to the law of the land."

*Walker* v. *Sauvinet*, 92 U. S. 90, 93, 23 L. Ed. 678.

## POINT 8.

### The Question of Due Process Was Originally Raised in Proper and Unmistakable Terms.

The right to due process, as by the constitutional provision, guaranteed. The right is substantial, and is no mere shibboleth, called into being and infused with vigor through the medium of recitation of pedantic phraseology only.

Its existence and its availability as protection against illegal deprivation of property at the hands of either the executive, legislative or judicial branches of government accompany the citizen at all times.

When in plain terms the citizen makes known to a court that he denies the right of jurisdiction in that court to entertain the proceedings in a given case, that citizen advises that court, plainly, succinctly and sufficiently, that he expressly chalienges the fundamental legality of that court's exercise of jurisdiction in the cause; and by reason of that challenge he definitely and necessarily and inescapably brings to the attention of said court the knowledge that further proceedings are in derogation of due process of law as described in the Constitution of the United States.

In the instant case, petitioner from the very beginning challenged the jurisdiction of the court. At every stage of the proceeding he reiterated his opposition to a determination of the cause by the court undertaking to adjudicate the matter, upon the specific, sole and only ground that under the laws of the State of Maryland the principles of common law—legal and equitable—the de-

cisions of this court adjudicating similar legal propositions, and the decisions of the Court of Appeals of Maryland, adjudicating cases of exact similarity—*the law was, had been, and is*—jurisdiction, in the sense of fundamental absence of any and all right to take cognizance of the cause was entirely lacking.

Judgment rendered determining that challenge to jurisdiction, necessarily and inescapably, directly involved a ruling upon the federal question. Such judgment could not be had without deciding the federal question.

> "* * * Questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases. * * *."
>
> *Pearson* v. *McGraw*, 308 U. S. 313, 318, 84 L. Ed. 293, 60 S. Ct. 211.

> "* * * no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.
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> * * * * * * *
>
> 'If it appears from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' *Powell* v. *Brunswick County*, 150 U. S. 433, 440."
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> *Green Bay and M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68, 43 L. Ed. 364, 19 S. Ct. 247.

## POINT 9.

**Specific Reference to the Constitutional Question, As Appearing in Petitioner's Motion for Reargument Was Timely, and in Itself Sufficient to Raise the Constitutional Question.**

Petitioner in taking his case to the court of appeals below upon the express proposition jurisdiction was lack-

ing by reason of the operation of the doctrine of equitable conversion was properly surprised at a judgment upholding jurisdiction, predicated upon the hypothesis the trustee did, and in law could, *sua sponte*, rescind his testator's trust instrument.

Nor could petitioner have reasonably anticipated such a ruling, in that no principle of law or equity, and no reported case petitioner has been able to find, have hitherto established such hypothesis as being the law of the land.

> "* * * There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."
>
> *Hernden* v. *Georgia*, 295 U. S. 441, 443, 444, 79 L. Ed. 1530, 55 S. Ct. 794.

## CONCLUSION.

It is respectfully submitted that the writ of certiorari should issue out of this Honorable Court, as petitioner herein prays.

Respectively submitted,

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